

tor of *Land Revenue*⁽³⁾ where he held that since the court's jurisdiction to entertain a collector's reference rested on statute (Land Acquisition Enactment) the conditions prescribed by it must first be complied with before the court could have jurisdiction to act upon it.

This principle was also quoted and applied by Rigby J. (as he then was) in the *Penang Yellow Bus Co. v. Rural District Council*.⁽⁴⁾ He also referred to a passage at page 131 of *Willway's Quarter Sessions Practice* which reads:—

"In all cases, whether under the Summary Jurisdiction Acts or otherwise, certain conditions precedent must be fulfilled before the Court to which the appeal is brought can assume jurisdiction to try it...Further, the condition as to the giving and serving of notices of appeal, and as to recognisances or other security for prosecution of the appeal, must be meticulously observed. Particularly in criminal cases the respondent often raises no objection to the inadequacy or irregularity of notices or other formalities, but even when no objection is raised by either party the court itself must take an objection which goes to the root of the matter, because to try an appeal when, for instance, the notice is out of time, is to purport to exercise jurisdiction when no jurisdiction exists."

The facts in *Penang Yellow Bus* case, *supra*, are similar to the instant case. There the Rural District Council assessed the annual value of the Penang Yellow Bus Co.'s premises at \$66,000. They appealed against such assessment and filed their notice of appeal in court but without paying the rates due. Counsel for the respondent contended that the appeal was not properly before the court by reason of the non-compliance by the appellants with the conditions laid down in section 68(3) of the Municipal Ordinance (S.S. Cap. 133) which reads:—

"No appeal shall lie against any assessment if the assessment being due is unpaid...."

Counsel for the appellants contended that the words "No appeal shall lie" meant "No appeal shall be heard by the court" and that since no specified time was stated for payment of the rates due, such condition imposed by this subsection would be sufficiently complied with if payment was in fact as was done in his case, paid before the hearing.

His Lordship rejected counsel's contention and held that payment of rates due was a condition precedent which must be complied with before the notice of appeal was lodged, and that as this was not done the appeal was not properly before the court.

Our instant case stands on stronger ground. The time for payment of the rates into court was specifically stated in section 44(i) of the Town Boards Enactment. With the *presentation* of the petition of appeal, the amount of rates appealed against shall be paid into court.

Counsel for the appellants argued that the word "With" should be construed to mean "In the course of or during". Even if this interpretation was accepted it would only mean "In the course of or during the *presentation* of the petition of appeal." It could not possibly mean "After the completion of the presentation of the petition." In the instant case the amount was paid into court 3½ months after the completion of the presentation of the petition. I there-

fore hold that the appellants had not complied with the condition laid down by the said subsection.

Counsel for the appellants further contended that the proviso to section 44(i) of the Town Boards Enactment was ambiguous. With respect to him I do not find any ambiguity. Even assuming that the proviso was capable of having two possible interpretations as claimed by him, I would still be bound by the canons of interpretation to adopt the one which would prevent abuse or mischief. As Lord Reid had said in the House of Lords' case of *Gartside & Anor. v. Inland Revenue Commissioner*⁽⁵⁾:—

"It is always proper to construe an ambiguous word or phrase in the light of the mischief which the provision is obviously designed to prevent, and in the light of the reasonableness of the consequences which follow from giving it a particular construction."

I hold that section 44(i) is a mandatory provision which goes to the jurisdiction of the court. It is not directory and cannot be waived.

I further hold that this court's jurisdiction to entertain appeals from the Board of the Federal Capital of Kuala Lumpur now known as the City of Kuala Lumpur was given by Statute (Town Boards Enactment Cap. 137) upon certain terms or conditions as prescribed by its section 44(i) and that unless these terms or conditions are complied with, the court's jurisdiction does not arise.

This appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Shook Lin & Bok.*

S.P.H. DE SILVA v. I.S. DAVID

[A.C.J. (Sharma J.) April 29, 1972]

[Ipoh — Civil Appeal No. 19 of 1971]

Principal and Agent — Manager authorised to sign cheques as "per pro" — Borrowing money on "per pro" signature — Failure to enquire as to extent of authority — Agent exceeding actual authority — Contracts (Malay States) Ordinance, 1950, s. 141 — Bills of Exchange Ordinance, 1949, s. 25.

One Arthur De Silva (deceased) was the manager of the Ipoh branch of the appellant/defendant's business. He was the appellant's brother. The appellant had authorized the deceased to operate his current account with the Chartered Bank and to "draw, sign and endorse cheques and give any instructions with regard thereto" until the bank was notified to the contrary by the appellant.

The said deceased drew two cheques for \$2,000 and \$3,000 on February 11, 1969 and February 25, 1969 respectively. These were "cash" cheques which were handed to the respondent/plaintiff by the deceased as security for a loan of \$5,000 advanced by him. The respondent presented the two cheques for payment which were dishonoured and returned to him on July 14, 1969 with the remark "refer to drawer".

The respondent brought an action in the sessions court for the recovery of the said sum of \$5,000. The defence raised was that the two cheques were drawn by procuration and that the deceased did not have any authority to issue the said cheques.

The learned president allowed the claim. The defendant appealed.

Held, allowing the appeal: (1) the cheques, having been signed "*per pro*" by the deceased, it was the duty of the respondent to inquire into the extent of authority possessed by the deceased to draw those cheques. The respondent failed to establish that the deceased had the authority of the appellant to borrow money;

(2) the respondent knew or should have known that in borrowing the amount the deceased was admitting to him that he (the deceased) could not overdraw and had consequently to borrow. Thus, if he could not overdraw and yet drew the two cheques, the deceased was exceeding the actual authority conferred upon him by the appellant.

Per curiam: The phrase "*per procuration*" is an express intimation of a special limited authority, and a person who takes a bill or note so drawn, accepted and endorsed, is bound to inquire into the extent of that authority.

Extent of authority of agents discussed.

Cases referred to:-

- (1) *Leadbitter v. Farrow* 17 R.R. 345, 348; 105 E.R. 1077.
- (2) *Brooks & Co. v. Blackburn Benefit Society* (1884) 9 App. Cas. 857, 864.
- (3) *Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. & Anor.* [1964] 1 All E.R. 630, 644.
- (4) *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716.
- (5) *Attwood & Ors. v. Munnings* 31 R.R., 194, 198; 108 E.R. 727.
- (6) *John & Ors. v. Dodwell & Co. Ltd.* [1918] A.C. 563; 569.
- (7) *Jacobs v. Morris* [1902] 1 Ch. 816.
- (8) *Reckitt v. Barnett, Pembroke & Slater Ltd.* [1929] A.C. 176.
- (9) *Reid v. Rigby & Co.* [1894] 2 Q.B. 40.
- (10) *Hawtayne v. Bourne* 56 R.R. 806, 809; 151 E.R. 905.
- (11) *Ricketts & Anor. v. Bennett & Field* 72 R.R. 691; 136 E.R. 678.
- (12) *Bank of Bengal v. Ramanathan Chetty* (1916) I.L.R. 43 Cal. 527, P.C.
- (13) *Bryant, Powis, & Bryant Ltd. v. La Banque Du Peuple* [1893] A.C. 170.
- (14) *Pole & Anor. v. Leask* (1862) L.J. Ch. D. 155; [1861-73] All E.R. Rep. 535.
- (15) *Eaton v. Bell* 106 E.R. 1106.
- (16) *Cuthbert v. Robarts, Lubbock & Co.* [1909] 2 Ch. 226, 233.

MAGISTRATE'S CRIMINAL APPEAL.

F. C. Arulanandom for the appellant.

G. Moganasundram for the respondent.

Cur. Adv. Vult.

Sharma J.: One Arthur De Silva (now deceased) was the manager of the Ipoh Branch of the defendant's business. He was the defendant's brother and the defendant had authorised him to operate his current account with the Chartered Bank and to "draw, sign and endorse cheques and give any instructions with regard thereto" until the bank was notified to the contrary by the defendant. The said Arthur De Silva (hereinafter referred to as the deceased) drew two cheques for \$2,000 and \$3,000 on 11th February, 1969 and 25th February, 1969 respectively. These were "cash" cheques and according to the plaintiff, they were handed to him by the deceased as a security for the loan of \$5,000 advanced by him. The plaintiff presented the two cheques for payment but these cheques were dishonoured and returned to him on 14th July, 1969 with the remark "Refer to Drawer". The

A plaintiff thereupon brought an action in the sessions court for recovery of the said sum of \$5,000. The only material defence to the plaintiff's claim is that the two cheques were drawn by procuration and that the deceased did not have any authority to issue the said cheques. The learned president gave judgment for the plaintiff and this is an appeal by the defendant against that judgment.

B Section 25 of the Bills of Exchange Ordinance, 1949 reads as follows:

"25. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

C The two cheques (Exhibit P1A and Exhibit P1B) were signed by the deceased *per pro* S.P.H. De Silva and therefore operated as a notice to the plaintiff that the deceased had only a limited authority to sign and that the defendant was bound by the signatures of the deceased only if he was acting within the limits of his actual authority.

D In *Leadbitter v. Farrow*,⁽¹⁾ Lord Ellenborough C.J. said:

"Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he becomes liable."

E The reason for this rule is plain. Each party who takes a negotiable instrument makes his contract with the parties who appear on its face to be bound for its payment and consequently it is recognised as a part of the mercantile law that a negotiable instrument must bear no mark but reveal its character on its face. The phrase "*per procuration*" is an express intimation of a special limited authority and a person who takes a bill or note so drawn, accepted and endorsed, is bound to inquire into the extent of that authority.

The learned president in his grounds of judgment says:

G "Can the plaintiff who had been dealing with the late Arthur De Silva for twelve years up to his death be expected to know that the deceased manager had no authority to issue cheques as security for loans made to the firm? According to the plaintiff the late manager had signed other cheques in his favour and all of them had been cleared in the past. All these cheques although not stated by the plaintiff must have been '*per pro*' cheques. On the evidence before me I found on a balance of probabilities that the plaintiff could not have been aware that the deceased manager of the firm of S.P.H. De Silva was not acting within the actual limits of his authority by issuing the two cheques as security for the loan of \$5,000. If there was an abuse of authority by the late manager unknown to the plaintiff that, in my view, did not exempt the defendant from being liable to the plaintiff. In the circumstances I gave judgment for the plaintiff in the sum of \$5,000 and costs."

H Exhibit P12 is a letter to the manager of the Chartered Bank authorising the deceased to operate the *current account of the defendant*. A current account is an open or a running account. It is an account based upon running or concurrent dealings between the parties which has not been closed, settled or stated, and which is kept unclosed with the expectation of further transactions. An overdraft arises when by

cheque, draft or order a customer of the bank draws from that bank more money than is standing to his credit in his account. A current account may be either a credit or an overdrawn account. A banker, however, is not obliged to let his customer overdraw unless he has *agreed* to do so or such agreement can be inferred from the course of business. (See *Brooks and Company v. Blackburn Benefit Society*⁽²⁾). Exhibit P12 nowhere states or suggests that the defendant had authorised the deceased to overdraw on that account or to borrow money from the bank, and there is no evidence that there was any agreement between the defendant and the bank whereby the bank had agreed to allow the defendant to overdraw. There is again nothing in the evidence from which an inference can be drawn that the course of the defendant's business at Ipoh was such that any one dealing with him would necessarily presume the existence of overdraft arrangements between him and his bankers.

The cheques having been signed *per pro* by the deceased, it was the duty of the plaintiff to inquire into the extent of authority possessed by the deceased to draw those cheques. The learned president, however, thought that the plaintiff in all probability was not aware that the deceased was acting outside the scope of his actual authority. This was altogether an erroneous approach to the interpretation and application of section 25 of the Bills of Exchange Ordinance, 1949. The learned president again thought that even if the deceased had abused his authority such abuse was unknown to the plaintiff and therefore the defendant could not escape liability. This again was a wrong approach by the learned president unless there was evidence to the effect that the amount received by the deceased went into the defendant's account and the defendant had the use of that money.

The principal becomes liable if he ratifies the transaction of the agent or if he is estopped from denying the agent's authority. As regards estoppel the principal is liable if the act of the agent is within his "ostensible" or "apparent" authority although it may not be within his "actual" authority provided the third party dealing with the agent had relied upon such "ostensible" or "apparent" authority.

In *Freeman and Lockyer (a firm) v. Buckhurst Park Properties (Mangal), Ltd. and Another*,⁽³⁾ Diplock L.J. (as he then was) explained thus:

"Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. . . .

An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usage of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor. . . .

An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the

contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract. . . .

. . . The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, i.e., by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agents has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has normally 'actual' authority to enter into."

There is nothing in the evidence of the plaintiff to show that he was relying on the ostensible or apparent authority of even the deceased or that the deceased had made any representation to him that he possessed the power to borrow. The question of any estoppel does not arise in this appeal.

It has been urged by the learned counsel for the respondent that a principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. (See *Lloyd v. Grace, Smith & Co.*⁽⁴⁾). The argument, however, begs the question whether the deceased in drawing the two cheques and handing them over to the plaintiff as a security for the loan was acting within the scope of his authority.

In *Attwood & Ors. v. Munrings*,⁽⁵⁾ Bailey J. said:

"This was an action upon an acceptance importing to be by procuration, and, therefore, any person taking the bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill, ought to exercise due caution, for he must take it upon the credit of the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority."

In *John & Ors. v. Dodwell and Company, Ltd.*⁽⁶⁾ Viscount Haldane delivering the judgment of the Privy Council said:

"For when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied it to trusts, or in the form which later developments of the Roman law have been recognised."

In *Jacobs v. Morris*⁽⁷⁾ the power of attorney authorised the agent "to purchase and to make any contract for the purchase of any goods in connection with the business carried on" by the plaintiff and to

make, draw, sign, accept or endorse any bills of exchange or promissory notes or to sign any cheques on his banking account in London. Sterling L.J. in that case observed:

"The primary cause of that loss is not anything done or omitted to be done by the plaintiff, but the neglect of ordinary business precautions by the defendants, Messrs. Morris. It is said, however, that the case falls within the decision in *Marsh v. Keating*. Farwell J. has held that the principle involved in the opinion given by the judges who advised the House of Lords in that case requires that two things should be established, first, that Messrs. Morris's money went into the plaintiff's account, and, secondly, that the plaintiff knew or had the means of knowledge, while it remained to the credit of that account, that it was the money of the defendants, Messrs. Morris. I agree with Farwell J. in taking this view of *Marsh v. Keating*, and I also agree with him in thinking that the defendants, Messrs. Morris, have failed in establishing the second point. I think, therefore, that the decision of the learned judge ought to be affirmed."

Cozens-Hardy L.J. said in the same case:

"The truth is that Messrs. Morris must be taken to have had full notice of the terms of the power of attorney, and that it did not authorise the borrowing of this 4,000l. They advanced the money on the attorney's statement that the power did authorize it. Their omission to read the power was the proximate cause of the loss. As between them and the plaintiff, I think they are more to blame; and it would not be just to hold the plaintiff liable for an act done by his attorney beyond the scope of his authority in favour of Messrs. Morris, who knew the limits of the authority."

Reference may also be made to *Reckitt v. Barnett, Pembroke and Slater, Limited*⁽³⁾ and *Reid v. Rigby & Co.*⁽⁹⁾

There is not a scrap of evidence to suggest that the sum of \$5,000 or any part thereof went into the defendant's account or was utilised by the deceased in connection with the defendant's business. The plaintiff himself stated:

"I have no evidence to support my statement that the loan was for the firm."

The defendant, on the other hand, asserted that the deceased had no authority to borrow on the strength of *per pro* cheques and that if he was short of funds such funds could easily be obtained either from Singapore or Hong Kong. The defendant went on to say that he came to know of the "loan" of \$5,000 only after the institution of the suit and this assertion of his was in no way challenged in his cross-examination.

Section 141 of the Contracts (Malay States) Ordinance, 1950 says:

"141. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business."

The power to purchase goods includes the power to pay for them but not the power to borrow. The degree of authority of an agent is to be judged by the nature of the business and the mode in which it is carried on. An agent has under section 141 an implied authority to pledge the credit of his principal for what is necessary to the successful management of the business and is usual but not to do anything which is unusual or which is neither necessary for nor in-

cidental to the execution of his express authority. The power to manage a business may imply an authority to raise money when the raising of the money is necessary for the proper carrying on of the business affairs which are to be administered by the agent. It must, however, be distinctly found that the act of the agent was necessary for the purpose of the business or was usual in the management of the business or was justified by an emergency.

There was no evidence produced by the plaintiff to indicate that in the type of the defendant's business managed by the deceased, it was a necessary incident of the business to borrow money or that an emergency had cropped up necessitating the raising of funds.

In *Hawtayne v. Bourne*⁽¹⁰⁾ Parke B. said:

"Now the extent of the authority conferred upon the agent by his appointment was this only — that he should conduct and carry on the affairs of the mine in the usual manner; there is no proof of express authority to borrow money from bankers for that purpose, or that it was necessary in the ordinary course of the undertaking; and certainly no such authority could be assumed.... Than as to the second ground, it appears that the learned judge told the jury that they might infer an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity, to raise money for that purpose. I am not aware that any authority is to be found in our law to support this proposition."

In the same case, Alderson, B., said:

"There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money, and pledge the credit of his principals for its repayment; and even if it were so, in this instance there was ample time and opportunity for him to have applied to his principals."

(Also see *Ricketts & Anor. v. Bennett & Field*⁽¹¹⁾).

The deceased in the present case had ample time and opportunity to get in touch with the defendant if he was in need of any funds.

Bank of Bengal v. Ramanathan Chetty⁽¹²⁾ was the case of a chettiar money-lending firm and it was because of the nature of that business and the evidence produced that it was held that the agent in that case had the implied authority to pledge the credit of the firm because without such authority the business could not be successfully carried on. (Also see *Bryant, Powis, & Bryant, Limited v. La Banque Du Peuple*⁽¹³⁾)

In *Pole & Anor. v. Lesak*⁽¹⁴⁾ the headnote states: "The burden of proof is on the person dealing with anyone as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it."

It was for the plaintiff to establish that the deceased had the authority of the defendant to borrow money and this he failed to do.

It could be (but was not) urged that when the deceased drew the cheques knowing well of the insufficiency of funds in the bank he was making a request to the bank for an overdraft (See *Eaton v. Bell*⁽¹⁵⁾).

In *Brooks & Co. v. Blackburn Benefit Society*,⁽²⁾ Lord Blackburn said:

"In all banking accounts the bankers, so long as the balance

of the account is in favour of the customer, are bound to pay cheques properly drawn and are justified, without any inquiry as to the purpose for which those cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals."

In *Cuthbert v. Roberts, Lubbock & Co.*⁽¹⁶⁾ Cozens-Hardy, M.R. said:

"If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan, and if the cheque is honoured the customer has borrowed money."

A mere request by the agent to the bank cannot be equated with the actual authority of the agent nor can an agreement by the bank to honour the cheques or to accommodate the defendant be inferred therefrom.

The claim of the plaintiff, however, is based upon the two cheques and not on any implied authority of the deceased to borrow the sums in question or on money had and received to the use of the plaintiff. These two cheques were signed by the deceased *per pro* the defendant and the plaintiff was consequently bound by the actual authority of the deceased which was confined only to the operation of the current account. The plaintiff knew or should have known that in borrowing the amount the deceased was admitting to him that he (the deceased) could not overdraw and had consequently to borrow. If he could not overdraw and yet drew the two cheques he was exceeding the actual authority conferred upon him by the defendant.

The appeal is allowed and the order of the learned president in so far as it relates to the plaintiff's claim is set aside with the result that the plaintiff's claim is dismissed. The appellant will have the costs of this appeal here and in the court below. The order relating to the defendant's counterclaim remains undisturbed.

Appeal allowed.

Solicitors: *Arulanandon & Co.; Yeoh Kian Teik & Co.*

A THE NEW INDIA ASSURANCE CO. LTD. v. KARAM SINGH

[A.C.J. (Gill F.J.) April 30, 1972]

[Muar — Civil Appeal No. 1 of 1970]

Practice and Procedure — Absence of plaintiffs and their counsel — Action dismissed — Request for reinstatement denied — Res judicata — Second action — Same parties — Earlier action not been heard and finally determined by the same court — Whether trial court was functus officio.

Insurance — Motor car policy — Recovery of money paid under policy owing to mistake of fact.

The appellants/plaintiffs' claim was for the return of \$1,522.67 paid to the respondent/defendant under a mistake of fact on the ground that the respondent made a false and fraudulent claim under a policy of insurance in respect of the respondent's motor car.

The plaintiffs filed an action in the sessions court on June 25, 1967 for the recovery of the said sum, but which action was dismissed as neither the plaintiffs' representative nor their solicitor was present in court on the date of the hearing. On November 25, 1968, the plaintiff's application under O. 19 r. 3(3) of the Subordinate Courts Rules, 1950, for the setting aside of the order of dismissal of the action, was dismissed with costs.

On May 31, 1969, the plaintiffs/appellants commenced the present action in respect of the same subject matter. On August 28, 1969, the learned president ordered that the suit be dismissed with costs on the ground that the court was *functus officio*.

The plaintiffs appealed.

Held, allowing the appeal: (1) the learned president became *functus officio* as regards the earlier action on his refusing the appellants' application for its reinstatement, but he did not become *functus officio* as regards the real dispute between the parties which he never tried;

(2) since the matter substantially in issue between the parties in the earlier action had not been heard and finally determined by the learned president, the plea of *res judicata* was not available to the respondent in the present action;

(3) therefore, the order appealed from must be set aside, and the learned president must hear and determine the action.

Cases referred to:-

- (1) *Bedwell v. Wood*, (1877) 2 Q.B.D. 626.
- (2) *Safety Insurance Co. Ltd. v. Hua Seng Electric Co.*, [1968] 1 M.L.J. 273.
- (3) *Buga Singh v. Koh Bon Keo*, [1967] 1 M.L.J. 16.
- (4) *Badat bin Drani v. Tan Kheat*, [1953] M.L.J. 67.
- (5) *Jenkins v. Robertson*, (1867) L.R. 1 H.L. 117.
- (6) *Lee Sem Yoong v. Leong Yoong*, [1967] 2 M.L.J. 86, 88.
- (7) *Chua Wee Seng v. Fazal Mohamed*, [1971] 1 M.L.J. 106.

MAGISTRATE'S CIVIL APPEAL.

H C. Arul for the appellants.

Atma Singh Gill for the respondent.

Cur. Adv. Vult.

Gill F.J.: Karam Singh, the defendant/respondent, was the owner of a motor vehicle bearing registration No. JB 37. He had his car insured with the New India Assurance Co., Ltd., the plaintiffs/appellants, for the period September 12, 1964 to September 11, 1965. The policy of insurance provided for the plaintiffs to indemnify the defendant, subject to a maximum of \$3,000, in respect of any damage to the car arising out of any accident in which it might be involved. One of the terms of the contract of insurance was that